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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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Date: OCT 04 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2).

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 27, 2008 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on July 24, 2007. The proffered wage as stated on the ETA Form 9089 is $89,170 per year.

The record indicates the petitioner is structured as a limited liability company (LLC) and files its tax returns on the owner's individual IRS Form 1040.[2] The petitioner submitted evidence demonstrating that it was established in 2005; the Form I-140 does not indicate its number of workers. On the ETA Form 9089, signed by the beneficiary on August 8, 2007, the beneficiary stated that he began working for the petitioner on October 1, 2005 and ceased working for the petitioner on July 24, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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[2] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted an IRS Form W-2 for 2007 demonstrating that it paid the beneficiary $68,813.[3] As the amount paid to the beneficiary is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2007 was $20,357.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the

[3] The petitioner submitted IRS Forms W-2 for 2005 and 2006, but as they cover a time period prior to the priority date, they will be considered only generally.

> AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F.Supp. at 537 (emphasis added).

The record before the director closed on July 23, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). In response to the director's RFE, the petitioner's sole member stated that its 2007 tax return had not yet been prepared and that he did not anticipate that the return would be prepared until October 2008. The 2007 tax return was not submitted with the instant appeal filed on November 26, 2008, and the petitioner provided no other regulatory-prescribed evidence of its ability to pay the proffered wage in 2007. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a copy of its 2007 tax return. The petitioner's failure to submit this document cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner's net income is reported income on Line 31, Schedule C of its member's individual IRS Form 1040. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. As the petitioner did not submit any tax returns or other regulatory-prescribed evidence of its ability to pay the proffered wage for the period after the priority date, we are unable to ascertain the petitioner's ability to pay the proffered wage in any relevant year.[4]

Counsel states that the petitioner is related to two other limited liability companies that all have the same owner. Specifically, he states that the petitioner was established to provide staff to one of the other limited liability companies. The owner of the petitioner, [redacted] submitted an affidavit stating that he is the sole owner of the petitioner, [redacted]. No other evidence was submitted to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). [redacted] stated that the petitioner is funded through

[4] The petitioner submitted its tax returns for 2005 and 2006, but as these returns cover only the time prior to the priority date, they will be considered only generally.

consulting agreements with [redacted] and that the petitioner shows a minimal or negative net income because of "income tax planning and other business reasons." The petitioner submitted three consulting agreements entered into between the petitioner and [redacted]. The first agreement, dated May 31, 2005, states that [redacted] will pay the petitioner $6,000 per month for its consulting services in the field of computer programming.[5] The second agreement, dated October 1, 2006, states that [redacted] will pay the petitioner $20,000 per month for its consulting services.[6] The third agreement, dated December 1, 2007, states that [redacted] will pay the petitioner $22,000 per month for its consulting services.[7] These documents are insufficient to demonstrate that the petitioner is able to pay the proffered wage as the agreements do not specify the identities, job descriptions or the number of workers that will be employed by the petitioner to perform the consulting services, or how the consulting fees are to be used by the petitioner. Further, all three agreements contain non-competition clauses which prohibit the petitioner from, among other actions, serving as a consultant or working for any business in competition with [redacted] in the states of Ohio, Kentucky and Illinois for a period of 24 months following the termination of the agreement. It is not clear that the petitioner would be able to employ the beneficiary or continue to operate its business if the terms of the non-competition clause were activated.[8]

The petitioner also submitted a 2006 audited financial statement for [redacted] However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."[9] Therefore, the assets of Open E Cry cannot be utilized to establish the

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[5] The term of the initial agreement was 36 months beginning on May 17, 2005.

[6] The term of the second agreement was 36 months beginning on October 1, 2006.

[7] The term of the third agreement was 36 months beginning on December 1, 2007. It is not clear that this term has been extended by the parties to the agreement.

[8] The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10).

[9] On appeal, counsel challenges USCIS's use of *Sitar v. Ashcroft* because [redacted] is not a shareholder of the petitioner, but instead is a "corporation with enforceable legal obligations.... to pay specified monthly consulting fees and additional expenses as needed." Contrary to counsel's assertions, *Sitar* is applicable to the instant case. While there is an existing contract to do work, nothing is specified in th consulting agreement or elsewhere that the beneficiary should be paid a certain amount, that the amounts paid by [redacted] should be devoted to the beneficiary's wages, or another scenario guaranteeing that the funds provided through the consulting agreement would be used to pay the beneficiary's wages. Counsel also cites *In Matter of X* for the proposition that an explicit guarantee would be required to accept a third party's assets and income in the calculation of whether the petitioner can pay thc proffered wage and that the consulting agreement is such an explicit guarantee. Counsel refers to a decision issued by the AAO, but does not provide its published

petitioner's ability to pay the proffered wage. Similarly, the income of the petitioner's owner cannot be considered in determining the petitioner's ability to pay the proffered wage. *Id.*

USCIS records indicate that the petitioner has filed three other petitions, including two Form I-129 petitions, and one other Form I-140 petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The priority date of the other Form I-140 filed by the petitioner is July 24, 2007. The petition was approved on September 22, 2008, and that beneficiary obtained permanent residence on November 13, 2008. Therefore, the petitioner must also establish its ability to pay the other beneficiary the proffered wage from July 24, 2007 to November 13, 2008. Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Since the record in the instant case fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition in 2007, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic

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citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, as stated above, the consulting agreement sets forth an amount to be paid by [redacted] to the petitioner and does not contain any evidence that the amount paid is based on the amount of the beneficiary's salary or that the amount paid would be increased to meet the proffered wage.

business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no regulatory-prescribed evidence of its ability to pay the proffered wage from the priority date onwards nor did it submit evidence to liken its situation to *Sonegawa* including evidence of reputation or that it had one off year. Further, the petitioner established no history of profitability, and it was organized in 2005, just two years prior to filing the labor certification and Form I-140 in the instant matter. On appeal, counsel states that the petitioner's 2007 profit and loss statement shows that the petitioner had a loss of $11,853.90 in 2007 due to unusual and non-recurring expenses including legal expenses and relocation expenses. The 2007 profit and loss statement was not submitted, nor has counsel presented evidence establishing that the petitioner's legal and relocation expenses in 2007 were uncharacteristic.[10] The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also asserts that the reasoning in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.DC 1988), applies in that the consulting agreement demonstrates that the petitioner has a "larger body for support." The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In any event, the petitioner in *Full Gospel* was found by the court to be part of an overarching, national organization of churches that could provide financial assistance as needed and the parishioners had made pledges to the music program which would be employing that beneficiary. *Id.* at 449. No similar situation was shown here. [redacted] had no legal obligation to provide additional financial assistance to the petitioner in excess of the consulting fees set forth in the consulting agreements. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[10] We also note that an unaudited profit and loss statement is insufficient to demonstrate the petitioner's ability to pay. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.